

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 vs. 1:17-CR-3237-JAP

7 JESUS FRANCISCO FERNANDEZ,

8 Defendant.

9

10 Transcript of Jury Trial before The Honorable James A.
11 Parker, Senior United States District Judge, held in
12 Albuquerque, Bernalillo County, New Mexico, commencing on
Wednesday, March 6, 2019, at 9:11 a.m., and concluding at 5:29
p.m.

13

14 For the Plaintiff: Samuel A. Hurtado, Esq.

15

16

17 For the Defendant: John F. Robbenhaar, Esq.

18 Esperanza S. Lujan, Esq.

19

20

21

22

23 John De La Rosa, CCR
24 United States Official Court Reporter
421 Gold Avenue, Southwest
25 Albuquerque, New Mexico 87102
Phone: 505.348.2249

1 (In open court, jury not present.)

2 THE COURT: Court's in session, have a seat, please.

3 Does the government have any objections to the court's
4 instructions?

5 MR. HURTADO: No, sir.

6 THE COURT: And does the defendant have any objections
7 to the court's instructions?

8 MR. ROBBENHAAR: No, Your Honor.

9 THE COURT: Okay. Let me visit with you about how long
10 you want for closing argument.

11 MR. HURTADO: The United States anticipates about 15
12 minutes for its closing argument.

13 THE COURT: And for the defendant?

14 MR. ROBBENHAAR: Probably a little bit longer, maybe
15 20, no more than 25.

16 THE COURT: Let me see if we have any means of warning
17 you when you're getting close in this courtroom. I'm not sure.

18 MR. ROBBENHAAR: Your Honor, I haven't timed my
19 closing. Would you permit me to go to 25?

20 THE COURT: Sure.

21 MR. ROBBENHAAR: Thank you, Judge.

22 THE COURT: When do you want a warning before the 25
23 minutes?

24 MR. ROBBENHAAR: Maybe at 20, something like that.
25 Hopefully, I'll be done by then.

1 THE COURT: And you're only going to use 15 minutes.

2 Is that correct?

3 MR. HURTADO: For my closing. I can't speak for
4 rebuttal.

5 THE COURT: For the closing. So 15 minutes for the
6 closing.

7 MR. HURTADO: So 15 minutes for the closing argument.
8 I don't know exactly how long I'll need for the rebuttal.

9 THE COURT: I understand.

10 MR. HURTADO: Because I don't know what Mr. Robbenhaar
11 is going to say.

12 MR. ROBBENHAAR: Can I make a suggestion? Would you
13 permit total us a total of half an hour?

14 THE COURT: Sure, that's fine.

15 MR. HURTADO: That's fine.

16 THE COURT: But I need to know when you want warning
17 signs.

18 MR. ROBBENHAAR: That would be five, then, thank you.

19 THE COURT: Okay. Anything else we need to take up
20 before the jury enters?

21 MR. HURTADO: No, sir.

22 MR. ROBBENHAAR: Nothing further from the defense, Your
23 Honor.

24 THE COURT: It's about 10 after 9:00. I told the jury
25 to be here at 9:30, so we'll be in recess for about 20 minutes.

1 Court's in recess.

2 (Court recessed at 9:12 to 9:32 a.m.)

3 (In open court, jury not present.)

4 THE COURT: There anything we need to take up before
5 the jury enters?

6 MR. HURTADO: No, Your Honor.

7 MR. ROBBENHAAR: No, sir, Your Honor.

8 THE COURT: Okay. Let's bring the jury in, then.

9 (Jury returned to the courtroom.)

10 THE COURT: Good morning, jurors. Please have a seat.
11 You will find in your chair a copy of the jury instructions
12 that I'm about to read to you, and you may read along as I give
13 you these instructions.

14 Members of the jury, you have now heard all of the
15 evidence in the case.

16 It becomes my duty, therefore, to instruct you on the
17 rules of law that you must follow and apply in arriving at your
18 decision in the case.

19 In any jury trial, there are in effect two judges. I
20 am one of the judges. The other is the jury. It is my duty to
21 preside over the trial and to determine what evidence is
22 relevant under the law for your consideration. It is also my
23 duty at the end of the trial to instruct you on the law
24 applicable to the case.

25 You as jurors are the judges of the facts, but in

1 determining what actually happened in this case, that is, in
2 reaching your decision as to the facts, it is your sworn duty
3 to follow the law I am now in the process of defining for you.

4 And you must follow all of my instructions as a whole.
5 You have no right to disregard or give special attention to any
6 one instruction or to question the wisdom or correctness of any
7 rule I may state to you. That is, you must not substitute or
8 follow your own idea or opinion as to what the law is or ought
9 to be. It is your duty to apply the law as I give it to you
10 regardless of the consequences.

11 By the same token, it is also your duty to base your
12 verdict solely upon the evidence in the case without prejudice
13 or sympathy.

14 The defendant is on trial before you upon an indictment
15 brought by the grand jury charging as follows:

16 On or about October 25, 2017, in Bernalillo County, in
17 the District of New Mexico, the defendant, Jesus Francisco
18 Fernandez, unlawfully, knowingly, and intentionally, possessed
19 with intent to distribute a controlled substance, 500 grams and
20 more of a mixture and substance containing a detectable amount
21 of methamphetamine.

22 In violation of 21 United States Code Sections
23 841(a)(1) and (b)(1)(A).

24 The indictment or formal charge against a defendant is
25 not evidence of guilt. Indeed, a defendant is presumed by the

1 law to be innocent. The law does not require a defendant in a
2 criminal case to prove the defendant's innocence or testify or
3 to produce any evidence at all. A defendant has an absolute
4 right not to testify and may not be compelled to testify. No
5 inference of any kind should be drawn from the election of a
6 defendant not to testify, and that fact should not be
7 considered by you in any way or even discussed in your
8 deliberations. The government has the burden of proving a
9 defendant guilty beyond a reasonable doubt, and if it fails to
10 do so, you must acquit the defendant.

11 Thus, while the government's burden of proof is a
12 strict or heavy burden, it is not necessary that the
13 defendant's guilt be proved beyond all possible doubt. It is
14 only required that the government's proof exclude any
15 reasonable doubt concerning the defendant's guilt. A
16 reasonable doubt is a real doubt based upon reason and common
17 sense after careful and impartial consideration of all the
18 evidence in the case.

19 Proof beyond a reasonable doubt, therefore, is proof of
20 such a convincing character that a person would not hesitate to
21 rely and act upon it in the most important of affairs.

22 The defendant is charged with a violation of 21 United
23 States Code Section 841(a)(1). This law makes it a crime to
24 possess a controlled substance with the intent to distribute
25 it. To find the defendant guilty of this crime, you must be

1 convinced that the government has proved each of the following
2 beyond a reasonable doubt:

3 First: the defendant knowingly and intentionally
4 possessed a controlled substance as charged;

5 Second: the substance was in fact methamphetamine;

6 Third: the defendant possessed the substance with the
7 intent to distribute it; and

8 Fourth: the amount of the controlled substance
9 possessed by the defendant was at least 500 grams.

10 Methamphetamine is a controlled substance within the
11 meaning of the law.

12 To possess with intent to distribute means to possess
13 with intent to deliver or transfer possession of a controlled
14 substance to another person with or without any financial
15 interest in the transaction.

16 The law recognizes two kinds of possession: actual
17 possession and constructive possession. A person who knowingly
18 has direct physical control over an object or thing at a given
19 time is then in actual possession of it.

20 A person who, although not in actual possession,
21 knowingly has the power and intent at a given time to exercise
22 dominion or control over an object either directly or through
23 another person or persons is then in constructive possession of
24 it.

25 As stated earlier, it is your duty to determine the

1 facts, and in so doing, you must consider only the evidence I
2 have admitted in the case. The term "evidence" includes the
3 sworn testimony of the witnesses, the exhibits admitted in the
4 record, and any stipulations to which the parties agree.

5 Remember that any statements, objections or arguments
6 made by the lawyers are not evidence in the case. The function
7 of the lawyers is to point out those things that are most
8 significant or most helpful to their side of the case, and in
9 so doing, to call your attention to certain facts or inferences
10 that might otherwise escape your notice.

11 In the final analysis, however, it is your own
12 recollection and interpretation of the evidence that controls
13 in the case. What the lawyers say is not binding upon you.

14 So, while you should consider only the evidence in the
15 case, you are permitted to draw such reasonable inferences from
16 the testimony and exhibits as you feel are justified in the
17 light of common sense. In other words, you may make deductions
18 and reach conclusions which reason and common sense lead you to
19 draw from the facts which have been established by the evidence
20 in the case.

21 You may also consider either direct or circumstantial
22 evidence. Direct evidence is the testimony of one who asserts
23 actual knowledge of a fact such as an eyewitness.
24 Circumstantial evidence is proof of a chain of facts and
25 circumstances indicating either the guilt or innocence of the

1 defendant. The law makes no distinction between the weight to
2 be given to either direct or circumstantial evidence. It
3 requires only that you weigh all of the evidence and be
4 convinced of a defendant's guilt beyond a reasonable doubt
5 before that defendant can be convicted.

6 Now, I have said that you must consider all of the
7 evidence. This does not mean, however, that you must accept
8 all of the evidence as true or accurate.

9 You are the sole judges of the credibility or
10 believability of each witness and the weight to be given to the
11 witness' testimony. In weighing the testimony of a witness,
12 you should consider the witness' relationship to the government
13 or the defendant; interest, if any, in the outcome of the case;
14 manner of testifying; opportunity to observe or acquire
15 knowledge concerning the facts about which the witness
16 testified; candor, fairness and intelligence; and the extent to
17 which the witness has been supported or contradicted by other
18 credible evidence. You may, in short, accept or reject the
19 testimony of any witness in whole or in part.

20 Also, the weight of the evidence is not necessarily
21 determined by the number of witnesses testifying as to the
22 existence or nonexistence of any fact. You may find the
23 testimony of a smaller number of witnesses as to any fact to be
24 more credible than the testimony of a larger number of
25 witnesses to the contrary.

1 The defendant did not testify, and I remind you that
2 you cannot consider his decision not to testify as evidence of
3 guilt. You must understand that the Constitution of the United
4 States grants to a defendant the right to remain silent. That
5 means the right not to testify. That is a constitutional right
6 in this country. It is very carefully guarded, and you must
7 not presume or infer guilt from the fact that a defendant does
8 not take the witness stand and testify or call any witnesses.

9 A witness may be discredited or impeached by
10 contradictory evidence by a showing that the witness testified
11 falsely concerning a material matter or by evidence that at
12 some other time the witness has said or done something or has
13 failed to say or do something which is inconsistent with the
14 witness' present testimony. If you believe that any witness
15 has so been impeached, then it is your exclusive province to
16 give the testimony of that witness such weight or credibility,
17 if any, as you may think it deserves.

18 The Rules of Evidence provide that if scientific,
19 technical or other specialized knowledge might assist the jury
20 in understanding the evidence, or in determining a fact in
21 issue, a witness qualified as an expert by knowledge, skill,
22 experience, training or education, may testify and state
23 opinions concerning such matters. You should consider each
24 expert opinion received in evidence in this case and give it
25 such weight as you may think it deserves. If you should decide

1 that the opinion of an expert witness is not based upon
2 sufficient education and experience, or if you should conclude
3 that the reasons given in support of an opinion are not sound,
4 or that the opinion is outweighed by other evidence, then you
5 may disregard the opinion entirely.

6 I caution you, members of the jury, that you are here
7 to determine the guilt or innocence of the defendant from the
8 evidence in this case. The defendant is not on trial for any
9 act or conduct or offense not alleged in the indictment.
10 Neither are you called upon to return a verdict as to the guilt
11 or innocence of any other person or persons not on trial as a
12 defendant in this case.

13 Also, the punishment provided by law for the offense
14 charged in the indictment is a matter exclusively within the
15 province of the judge and should never be considered by you in
16 any way in arriving at an impartial verdict as to the guilt or
17 innocence of the defendant.

18 Any verdict must represent the considered judgment of
19 each juror. In order to return a verdict, it is necessary that
20 each juror agree to it. In other words, your verdict must be
21 unanimous.

22 It is your duty as jurors to consult with one another
23 and to deliberate in an effort to reach agreement if you can do
24 so without giving up your individual judgment. Each of you
25 must decide the case for yourself, but only after an impartial

1 consideration of the evidence in the case with your fellow
2 jurors. In the course of your deliberations, do not hesitate
3 to reexamine your own views and change your opinion if
4 convinced it is erroneous. But do not surrender your honest
5 conviction as to the weight or effect of the evidence solely
6 because of the opinions of your fellow jurors or for the mere
7 purpose of returning a verdict.

8 Remember at all times, you are not partisans. You are
9 judges, judges of the facts. Your sole interest is to seek the
10 truth from the evidence in the case.

11 During your deliberations, you must not communicate
12 with or provide any information to anyone by any means about
13 this case. You may not use any electronic device or media such
14 a telephone, smart phone, computer, the Internet, any text or
15 instant messaging service, blog or any website such as
16 Facebook, LinkedIn, YouTube or Twitter to communicate to anyone
17 any information about this case or to conduct any research
18 about this case until after I accept your verdict. In other
19 words, you cannot talk to anyone on the phone, correspond with
20 anyone, or electronically communicate with anyone about this
21 case. You can only discuss the case in the jury room with your
22 fellow jurors during deliberations.

23 You may not use electronic means to investigate or
24 communicate about the case because it is important that you
25 decide the case based solely on the evidence presented in this

1 courtroom. Information on the Internet or available through
2 social media may be wrong, incomplete or inaccurate. You are
3 permitted to discuss the case only with your fellow jurors
4 during deliberations because they have seen and heard the same
5 evidence you have. In our judicial system, it is important
6 that you are not influenced by anything or anyone outside this
7 courtroom. Otherwise, your decision may be based on
8 information known only by you and not by your fellow jurors and
9 the parties in the case. This would unfairly and adversely
10 impact the judicial process.

11 Upon retiring to the jury room, you should first elect
12 a foreperson who will preside over your deliberations and will
13 be your spokesperson in court.

14 A form of verdict has been prepared for your
15 convenience. You will take the verdict form to the jury room,
16 and when you have reached unanimous agreement as to your
17 verdict, you will have your foreperson fill in, date, and sign
18 it and then notify the court security officer that you have
19 reached a verdict.

20 If, during your deliberations, you should desire to
21 communicate with me, please put your message or question in
22 writing signed by the foreperson and pass the note to the court
23 security officer who will bring it to my attention. I will
24 then respond as promptly as possible either in writing or by
25 having you returned to the courtroom. I caution you, however,

1 with regard to any message or question you might send that you
2 should never state your numerical division.

3 Now, you'll find as the last page with the jury
4 instructions a copy of the verdict form. The form is very
5 simple. You are to, after you reach a unanimous verdict,
6 indicate your verdict either as not guilty or guilty in the
7 blank space provided, and your foreperson is then to date and
8 sign the verdict form.

9 I will send the original verdict form with this
10 envelope to the jury room, and the foreperson needs to fill out
11 only the original verdict form, not each copy that you have
12 with you with your copy of the jury instructions.

13 At this point, we're going to proceed with the closing
14 arguments. I remind you that the arguments by the lawyers are
15 not evidence in the case. They will discuss the evidence in
16 the case with you during their closing arguments.

17 Let's see, Mr. Hurtado, are you ready to proceed with
18 your argument?

19 MR. HURTADO: Yes, sir, Your Honor, if I may.

20 THE COURT: You may.

21 MR. HURTADO: Ladies and gentlemen, as I advised at the
22 very beginning of the trial, the United States fully accepted
23 the burden of proving the defendant's guilt beyond a reasonable
24 doubt. The prosecution submits to you that the prosecution has
25 done precisely that. So what I would like to do at this time

1 is walk you through how the United States went about proving
2 the defendant's guilt beyond a reasonable doubt.

3 As an initial matter, I would like to walk through the
4 elements of the crime charged against the defendant.

5 As I indicated before, I would like to walk through the
6 elements of the crime charged to show how the United States has
7 proven the defendant's guilt beyond a reasonable doubt. As
8 displayed on the the projector, the first element is the
9 defendant knowingly or intentionally possessed a controlled
10 substance as charged. That first element is really the reason
11 why we're here today. It's so important I actually want to
12 come back to it and address the other elements before going
13 back to that one.

14 So with that said, let's proceed to the second element
15 which reads as follows, "The substance was in fact
16 methamphetamine." As to that second element, I would
17 respectfully invite your attention to the testimony of the
18 forensic chemist in this case, Mr. Paul Galat. Mr. Galat is a
19 veteran forensic chemist with the DEA who has 20 years of
20 experience. Mr. Galat indicated that he conducted a forensic
21 chemical analysis of the substance in this case, and in no
22 uncertain terms, Mr. Galat stated that in his expert opinion
23 the substance that was tested was methamphetamine. So very
24 simply, I would submit to you that this second element has been
25 proven beyond a reasonable doubt by virtue of the testimony of

1 the expert in this case, Mr. Galat. As such, you can very
2 simply check that element off the list.

3 The third element is "the defendant possessed the
4 substance with the intent to distribute it." Once again, I
5 would respectfully invite your attention to the testimony of
6 Agent Perry, a 20-year veteran of the DEA. He testified in no
7 uncertain terms that the amount of methamphetamine seized in
8 this case was a distributable quantity, and at this time, I
9 would like to publish for a brief moment Defendant's
10 Exhibit B24. Defendant's Exhibit B24 is a photograph which
11 depicts the seven bundles of drugs that Agent Perry found in
12 the defendant's black duffle bag. I would submit to you that
13 the amount of methamphetamine seized is such a large amount
14 that it is reasonable for you to infer that no person can
15 consume such a large amount of methamphetamine in a single
16 sitting. As such, it stands to reason that the defendant must
17 have intended to deliver this to somebody else or some other
18 person. As such, I would submit to you that that third element
19 has been satisfied beyond a reasonable doubt, and you can check
20 that one off your list as well.

21 The fourth element is "the amount of the controlled
22 substance possessed by the defendant was at least 500 grams" as
23 charged. As to that element, I would again invite your
24 attention to the testimony of the DEA forensic chemist,
25 Mr. Galat. Mr. Galat indicated that after his forensic

1 chemical analysis he also weighed the drugs. The chemist, Paul
2 Galat, testified that the total weight of the methamphetamine
3 was 3,104 net grams. Mr. Galat also indicated that the
4 methamphetamine was 96 percent pure which, when you multiply by
5 3,104 net grams, you get a total of 2,979 actual grams of
6 methamphetamine. So, ladies and gentlemen, whether you choose
7 to accept the net amount of methamphetamine or the actual
8 amount of methamphetamine, both amounts are well above the 500
9 grams as set forth in the fourth element of the crime charged
10 against the defendant. So I would submit that you can now
11 cross off your list the second element, the third element, and
12 the fourth element.

13 Now, ladies and gentlemen, I want to go back to the
14 first element as I indicated I would before, which reads, "the
15 defendant knowingly or intentionally possessed a controlled
16 substance as charged." As an initial matter, you have now been
17 instructed by the charge that methamphetamine is a controlled
18 substance, so what do we have to show that the defendant
19 knowingly or intentionally possessed with the intent to
20 distribute methamphetamine? Ladies and gentlemen, I submit to
21 you that you have both direct evidence in this case and
22 circumstantial evidence to show that the defendant knowingly or
23 intentionally possessed methamphetamine.

24 What do you have in the form of direct evidence to show
25 that the defendant possessed the methamphetamine? Ladies and

1 gentlemen, you have the fact that the defendant admitted to
2 Agent Perry without any hesitation that the black bag
3 containing methamphetamine belonged to him. As a matter of
4 fact, the defendant stated that he would give Agent Perry the
5 opportunity to search that bag. Ladies and gentlemen, you do
6 not give somebody permission to search a bag that does not
7 belong to you. As such, I would submit that that is the first
8 critical piece of evidence to show that the defendant knowingly
9 or intentionally possessed the methamphetamine in this case.

10 Let's take a look at the transcript. Ladies and
11 gentlemen, just as a reminder, the transcript is not evidence.
12 The actual audio recording is the evidence. The transcript is
13 simply being used to assist you in understanding the audio
14 recording.

15 Agent Perry asks the defendant, "Is this your bag,
16 sir?"

17 The defendant responds, "Yeah, it's my bag."

18 Agent Perry confirms, "Your bag. Okay."

19 The defendant responds by asking Agent Perry a
20 question. "You wanna check it out?"

21 Agent Perry responds, "It is your -- okay. Will you
22 give me permission to search it?"

23 The defendant responds, "Yeah."

24 Agent Perry then says, "Okay. Thank you. Will it be
25 okay if I jut set it up here?"

1 The defendant responds by saying, "Yeah."

2 During his cross examination of Agent Perry, the
3 defense tried to suggest that perhaps there was a language
4 barrier between Agent Perry and the defendant. The prosecution
5 would submit that the facts of this case do not support the
6 defendant's contention that there was some kind of language
7 barrier. There is no indication from the transcript or the
8 audio recording that the defendant did not understand what was
9 going on. His responses to Agent Perry's questions were clear
10 and direct. The defendant did not express any confusion about
11 what was going on. And as a matter of fact, if the defendant
12 did have any problem understanding what Agent Perry was saying,
13 Agent Perry can speak Spanish, and he could have easily began
14 speaking Spanish with the defendant. Agent Perry did not feel
15 the need to do that in this case because the conversation was
16 clear. There was no ambiguity involved in this case.

17 Once Agent Perry searched the bag, the defendant
18 immediately tried to disclaim ownership of the bag, and of
19 course, he would. He knows that there is methamphetamine in
20 that bag, and he wants to distance himself by saying, "It's not
21 my bag."

22 The circumstances surrounding that are telling. I'll
23 tell you why. If you recall, Agent Perry retrieved the black
24 duffle bag, Government's Exhibit 3, from the overhead
25 compartment area. He presents it to the other passengers on

1 the bus each of whom disclaimed ownership of that bag. When he
2 presents that bag to the defendant, the defendant recognizes
3 the bag and admits that it's his bag as referenced in the
4 transcript that I just showed you.

5 Agent Perry receives permission to search that bag. As
6 you recall, Agent Perry indicated that he placed the bag in the
7 seat directly in front of the defendant's seat. Imagine Agent
8 Perry is the defendant and he's seated there. Agent Perry sets
9 the black duffle bag in the seat directly in front of the
10 defendant. Agent Perry unzips the bag and finds what he
11 believes to be packages of drugs. It was at that time that
12 Agent Perry decides to place the defendant under arrest, and he
13 instructs the defendant as follows:

14 "Go ahead and stand up for me, sir."

15 And what does the defendant say immediately? He says,
16 "It's not my bag. I don't know. It's not my bag."

17 Ladies and gentlemen, he says that, the defendant says
18 that, because he knows what's in that bag. Do you recall Agent
19 Perry's testimony? He stated that when he searched the
20 defendant's bag, Agent Perry never notified the defendant about
21 what he saw in that bag. He never told the defendant what he
22 found in that bag. He never showed the defendant what he found
23 in that bag. Agent Perry did not have to tell the defendant
24 what he had found in that bag because the defendant already
25 knew what was in that bag. That's why he says immediately,

1 "It's not my bag."

2 What else is there to show a connection between this
3 bag and the defendant? As I mentioned before, we have the
4 defendant's direct admission that the bag belonged to him, but
5 you also have the fact that there were medical records inside
6 that black duffle bag in the defendant's name.

7 I would like at this time to publish Defendant's
8 Exhibit B18. Ladies and gentlemen, those medical records
9 establish additional evidence to show a connection between the
10 defendant and that bag.

11 What other evidence has the prosecution presented to
12 you which relates to the first element of the crime charged,
13 that being whether the defendant knowingly or intentionally
14 possessed methamphetamine in this case? I would respectfully
15 invite yourself to the testimony of Agent Kirk Lemmon. Agent
16 Lemmon testified that when the defendant boarded the bus, the
17 defendant had a surprised or panicked look on his face when he
18 saw Agent Lemmon and Agent Perry who was in the back of the
19 bus. Notably, Agent Lemmon noted in his testimony that no
20 other passenger reacted the way the defendant did. You can
21 infer from the defendant's behavior on that bus consciousness
22 of guilt. You can infer that he knew that he was in possession
23 of a large amount of methamphetamine.

24 Remember that the judge's instructions provide that you
25 are permitted to draw reasonable inferences from the testimony

1 and exhibits in this case. Inferences that you feel are
2 justified in the light of common experience. An inference is
3 simply a conclusion that reason and common sense may lead you
4 to draw from the facts which have been proved in a case.

5 Ladies and gentlemen, why else would the defendant,
6 shortly after taking his seat on the bus, get out of his seat
7 and go to the lavatory in the rear of the bus? When the
8 defendant gets inside the lavatory, he opens the door, pokes
9 his head out, looks in the direction of Agent Perry, retreats
10 back inside the lavatory and shuts the door. Then he takes his
11 seat a few moments later.

12 The reason the defendant did that, the reason you can
13 infer he did that, is he was panicked, and he didn't know what
14 to do. And he also recognized Agent Perry from a few days
15 earlier at the same Greyhound Bus Station. He was panicked
16 because he knew he was transporting a large amount of
17 methamphetamine, and he did not want to get in trouble.

18 To be sure, the United States is relying a lot on
19 circumstantial evidence. But please remember as a general rule
20 the law makes no distinction between direct evidence and
21 circumstantial evidence. The law simply requires that you find
22 the facts in accord with all the evidence in the case, both
23 direct and circumstantial.

24 I would also like to remind you of a promise you made
25 very early on during jury selection. I asked every one of you

1 if you would promise to consider circumstantial evidence in
2 this case. If you recall, I asked you whether you watched "Law
3 and Order" or "CSI," and I was up front. I told you that this
4 case would not be like that. And when I asked you will you
5 consider circumstantial evidence in this case, every single one
6 of you said, "Yes, I promise." Nobody forced you to make that
7 promise. As a matter of fact, you had the opportunity to say
8 "No, I don't promise, and I want to see only direct evidence."
9 But none of you did that.

10 I did what I said I was going to do, and it was to
11 prove this case beyond a reasonable doubt, and now I'm asking
12 you to do your part and find the defendant guilty not because I
13 say so, but because the facts show that he's guilty. So ladies
14 and gentlemen, based upon all this evidence, I now submit to
15 you that all elements of the crime against the defendant have
16 been satisfied beyond a reasonable doubt. The first element
17 has now been satisfied. The second element has now been
18 satisfied. The third element has now been satisfied. The
19 fourth element has now been satisfied.

20 Ladies and gentlemen, that constitutes the sum of the
21 prosecution's evidence in this case. Mr. Robbenhaar will have
22 the opportunity to address you next, and after he presents his
23 closing remarks, I'll have one last chance to address you.

24 I thank you for your time.

25 THE COURT: Mr. Robbenhaar, you may present the

1 defendant's closing argument.

2 MR. ROBBENHAAR: Thank you, Your Honor.

3 May it please the court, counsel, members of the jury.

4 Not guilty. That's the verdict I'm asking you to reach
5 when you go back to deliberate the facts of this case. This is
6 a case of tunnel vision. It's a case of lost in translation.
7 It's a case built on a shoddy investigation. It's about
8 officers looking for shortcuts.

9 This morning, I'll review the evidence with you and
10 point out some key facts to help you understand my points. But
11 first, let me talk a little bit about the government's burden.
12 In our country, the beyond-a-reasonable-doubt standard is the
13 highest standard imposed on a party at any trial. It's a
14 standard that Judge Parker has instructed you on that the
15 government must meet. This standard requires the government to
16 present you proof that leaves you firmly convinced without
17 reasonable doubt that Jesus Francisco Fernandez committed the
18 alleged crime of possession with the intent to distribute a
19 controlled substance. And we have it -- I'm sorry.

20 Thank you, Dan.

21 You have the reasonable doubt instruction on the
22 screen.

23 Now, I won't read it in full, but the part that's on
24 the screen, "A reasonable doubt is a real doubt based on reason
25 and common sense after careful and impartial consideration of

1 all the evidence in the case. Proof beyond a reasonable doubt,
2 therefore, is proof of such a convincing character that a
3 person would not hesitate to rely on it and act upon it in the
4 most important of affairs."

5 So that's a tall order. Before you can convict, you
6 must be firmly convinced. If you have any hesitations about
7 the government's case that the particular proof lacks a
8 convincing character or you would hesitate to rely on it in the
9 most important of affairs, then you have a reasonable doubt. I
10 would suggest there is much to be wary of in this case, much to
11 caution you to hesitate in relying on the government's
12 evidence. Let's talk about some of that.

13 The government wants you to believe that Mr. Fernandez
14 was traveling with a black bag which contained drugs. The
15 officers believe so. They saw that bag as suspicious and
16 intended to search it and find its owner. You heard that from
17 officers Perry and Lemmon. But they have no evidence that
18 links the bag to Mr. Fernandez. They don't have any witnesses.
19 They don't have fingerprints, we know. They don't have DNA
20 evidence. They don't have surveillance video that might help
21 them. Rather, they rely on a questionable statement made by
22 Mr. Fernandez and equally questionable testimony by the agents.

23 The government needs to stretch to make their
24 connections. How do that they do that? A few things. Medical
25 discharge paperwork. We've heard a lot about that in this

1 case.

2 First, they point to the discharge papers as some sort
3 of smoking gun that ties Mr. Fernandez to the bag. But there
4 is no way that these papers could have ended up in the bag.
5 Why? You have seen Mr. Fernandez board the bus with papers in
6 his hand. It's clear on that surveillance video that he's
7 walking to board the bus, and there is a big thing of white in
8 his hand flashing in the sunlight when he boards the bus.
9 That's what this is. You will note also -- this will go back
10 to you in the jury room. There is a center crease on this
11 paperwork. Why is that important? Because it was folded and
12 placed in Mr. Fernandez's hoodie pocket.

13 The only other paperwork, the only other paperwork in
14 this case, in this entire case, is this. What are these?
15 Government's Exhibit 2, a bus ticket, another bus ticket, and a
16 little reboarding tag. I would submit to you that you know
17 that when you see that video of Mr. Fernandez approaching the
18 bus flashing what clearly is white, what clearly is paperwork
19 in his hand -- it can't be -- it cannot be those little
20 tickets. The only other paperwork in this case is this. And
21 they are coming apart. I'm sorry. But they were stapled.

22 Yet the government -- the agents will say that that
23 paperwork was in the bag, and yet we know from the video that
24 Mr. Fernandez never approaches his bag, that bag. He never
25 touched the bag. So the government will have you believe that

1 that paperwork was in there from the start, but it's not.

2 Of course, the government will say you can't be sure
3 what the item is in his hand. The video is too grainy. It's
4 unclear. It can't be relied upon. But you've seen it, and I
5 trust you recognized it.

6 First, you know that that is Mr. Fernandez walking to
7 the bus, that person who has that white bundle of paperwork,
8 sits in the very seat that we know Agent Perry encounters
9 Mr. Fernandez. We know that's the same seat where he arrests
10 Mr. Fernandez. There is no question that that's Mr. Fernandez
11 walking to the bus with a white bunch of papers in his hand.

12 The video also confirms that after reboarding, as I
13 just mentioned, Mr. Fernandez never stopped by where we know
14 the black bag is. We know that that black bag is three to four
15 rows behind where Mr. Fernandez's seat was. So if the
16 discharge papers were in his hand when he boarded the bus, how
17 did they get into the bag? That's really the million dollar
18 question here.

19 I talked about the center crease on the paperwork. I
20 talked about the hoodie. Yet these agents will have you
21 believe that these papers were discovered during the unpacking
22 of the bag, during that methodical processing of the evidence.
23 We heard about that, and we saw the photos. One by one by one,
24 you see the JPEG, the camera numbering system on the bottom of
25 the photos. That's why the defense introduced the photos that

1 are kind of redundant to the government. They are the same
2 photos, but the format produced by the government, these are
3 directly from the camera, and they show the sequencing. There
4 is no question of the sequence of those photos. You look at
5 the JPEG numbers on the bottom. Step by step, first photos,
6 there are a number of photos of the bag from different angles.
7 Then the bag is opened, and then one by one, items are removed,
8 placed on the floor, then opened, and then the next layer and
9 the next layer, and not one of those photos, not one, shows you
10 the paperwork.

11 You would think that the paperwork would appear in the
12 bag. They are claiming it does. And if it does, it's such an
13 important piece of evidence, don't you think it would be
14 photographed? Of course, they would document this. They are
15 trained to make their case. They are trained officers. They
16 would have photographed that paperwork coming out of the bag.

17 Agent Lemmon yesterday, he hedged his testimony. You
18 remember that. He says, "I didn't see it in the bag. Agent
19 Perry told me it came out of the bag. I don't know where it
20 came out of the bag. Maybe it came out of one of those side
21 pockets." Agent Perry didn't say that. He said it came out of
22 the bag. Nothing about a side pocket. That's the first we've
23 heard anything about a side pocket here.

24 Agent Lemmon just says, "He showed it to me, and I took
25 a photo." And that photo of the paperwork is conveniently

1 placed on top of the bag. And if you look carefully, all the
2 clothing is back in the bag. Everything has been put back in.
3 Obviously, not the controlled substances, but all the items are
4 back in the bag, and then this bundle of paperwork is just
5 conveniently placed on top of the bag. Agent Lemmon, click.
6 That should give you hesitation. Can you rely on that? I
7 would suggest you can't.

8 Why would the agents manipulate the evidence like this?
9 Because they had nothing else to directly tie Mr. Fernandez to
10 that black bag. They knew it. No personal items or effects
11 with identifying labels, no nametags, no fingerprints, no DNA,
12 no surveillance video.

13 More importantly, ladies and gentlemen, what does the
14 fact that they had to concoct this story, to manufacture this
15 fake photo, tell you? That they had doubt. That's what it
16 tells you. Agent Perry realized he didn't have it, and what he
17 needed was something concrete. Put that paperwork right on top
18 of the bag. Let's take that photo. Got it. They have a
19 questionable claim of ownership by Mr. Fernandez and knew they
20 needed more. So they had to come up with something to tie
21 Mr. Fernandez to the bag. Aha, medical paperwork. Bingo.

22 Now, these are not just some police officers. They are
23 federal agents. Agent Perry has 20 years experience as a
24 federal agent. We don't want to believe that officers plant
25 evidence, but it happens. It's happened before, and it will

1 happen again. We rely on police officers to keep us safe. We
2 respect police officers.

3 And let me be clear, these are good men. Agent Perry
4 and Agent Lemmon are good men. But they knew that they lacked
5 an essential ingredient in their case and felt that they could
6 get away with it.

7 We can debate whether Agent Lemmon was maybe a little
8 arrogant during his testimony, whether he was somewhat
9 dismissive during his testimony. We argued whether the report
10 contains errors. We went back and forth. They can't own up to
11 a mistake. But the important thing is that we as a society
12 demand the highest level of trust in police officers, and
13 unfortunately, here, we're not seeing it. I think you
14 recognize that.

15 In their tunnel vision, the agents planted that
16 paperwork to confirm their suspicions and make their case
17 against Mr. Fernandez. It's just not right. We have a case
18 here of agents falling prey to their own tunnel vision. They
19 knew that bag was suspicious. They checked it out. They
20 wanted to find its owner.

21 But consider this. I played you that long video, and
22 it was long. For that, I apologize. But I think and I know
23 it's crucial for you to have the entire video from start to
24 finish.

25 Alexis Merritt, the first person that Agent Perry spoke

1 to on the bus. She was supposedly traveling by herself to
2 Connecticut, going to school, to move in with her boyfriend.
3 She's thinking she's going to be in maybe Stamford or Norwalk,
4 I think it was. She doesn't really know what school she's
5 going to. She says she's traveling alone. She doesn't want
6 Agent Perry to search her bag, though. She does allow -- she
7 does open it up and show the items to Agent Perry, but she
8 didn't want him to search it. After being pressed, she opens
9 the bag and then shows him the items. Agent Perry then wants
10 to see under her shirt, and she said, "Really?" No way.
11 That's Ms. Merritt.

12 Then a few minutes later -- Agent Perry had gone down
13 the bus a couple of rows, somebody passed him in the aisle. A
14 few minute later, he comes back to where he met Ms. Merritt,
15 and what do you know? He meets Christopher Merritt.
16 Christopher Merritt is also traveling eastbound on the bus.
17 Now, he's going to Florida, not Connecticut, apparently. They
18 are sitting basically next to each other, maybe one row apart.
19 He allows himself to be searched. He allows himself to be
20 searched. He's got nothing.

21 But don't you know? The black bag with the dope is
22 right above them. Right above the Merritts, two individuals
23 with the same last name traveling on the same bus, but they
24 don't know each other. The odds. And yet was there any
25 follow-up on this? No, not a thing.

1 Watch the video. The video doesn't lie. I know we
2 watched that long video, but it is vital, as I stated, to
3 understanding this case.

4 We know that Mr. Fernandez takes his seat, but he waits
5 10 minutes. After 10 minutes of sitting in his seat, he gets
6 up and goes to the rest room. Agent Perry wrote in his report
7 that he saw him take his seat and get up immediately. Small
8 detail you might say, but this is a report that without the
9 video we would have had to have just accepted as fact. We know
10 that's not true. And there is other details in the report that
11 I questioned Agent Perry about yesterday that we know there are
12 errors in the report. That's why this video is so important,
13 because it fleshes out what really happened. Without that
14 video, we have to accept at face value everything that's stated
15 by the agent. The government doesn't like the video. That's
16 the reason why.

17 In fact, the government would prefer that this
18 surveillance video just simply doesn't exist. That's why they
19 dismiss it so vigorously. You can bet your last dollar that
20 their tune would be different if they had obtained video
21 showing some actual connection to the bag. If it were a
22 different case and the government were relying on that video,
23 you know they would be standing here just like I am now saying,
24 "Look at that video, rely on the video." Remember, they didn't
25 obtain the video in this case. The defense did. And why?

1 Because we suspected something was up.

2 Keep in mind that they didn't show it to you; we did.
3 They only wanted you to hear Perry's audio recording. But I'm
4 sure you see now that the synced audio-video file gives context
5 to what you're viewing. It also reveals a fuller picture of
6 what really happened.

7 So why are these discrepancies important? I would
8 suggest they reveal a police investigation that reached its
9 conclusion before all the evidence was in.

10 Recall that when Agent Perry first confronts
11 Mr. Fernandez, Agent Lemmon inches close. You see it on the
12 video. It's very subtle, but if you pay attention to that area
13 that I pointed out during my cross examination yesterday, Agent
14 Lemmon is standing in the front of the bus, inches closer. He
15 doesn't do that with anybody else, just Mr. Fernandez. And
16 why? Because he and Agent Perry were looking for
17 Mr. Fernandez. They were focusing on him.

18 Then after Mr. -- after Agent Perry concludes with the
19 encounters of the other passengers, you hear him state, "Let me
20 go get that bag." They knew all along that that was purpose of
21 their job that morning, was to pin that bag on somebody.

22 You recall the remarkable coincidence with the two
23 Merritts sitting almost directly underneath the bag. No
24 follow-up.

25 Think about the fact that there was never an attempt to

1 get fingerprints or DNA. No witness statement. Didn't talk to
2 the bus driver, apparently. Didn't try to get any other
3 witness statements of anybody who might see who brought that
4 bag on the bus.

5 The actions of the agents caught on videotape show that
6 they are focused on Mr. Fernandez. I ask you to consider this
7 when you evaluate their credibility.

8 Now, how about this notion of lost in translation? The
9 audio indicates that Agent Perry confronted Mr. Fernandez a
10 second time. This time with a bag, holding it, and apparently
11 Mr. Fernandez was quick to respond, yeah, the bag was his, but
12 did he mean the bag was his? Or the bag was like one he had
13 traveled with previously?

14 Keep in mind a few things. We know that
15 Mr. Fernandez's native language is not English. You can hear
16 it on the tape. His English is terrible. Lidia Fernandez
17 testified to that. Second, he and Agent Perry had just been
18 speaking about luggage and bags. Mr. Fernandez admitted that
19 he had traveled with a brown and black bag days before, and
20 when Agent Perry appears suddenly the second time now carrying
21 a bag, he could have been confused, startled, that all of a
22 sudden this black bag was shown to him. Third, there is a
23 difference between luggage and a bag, and for someone whose
24 first language is not English, that could surely affect that
25 person's comprehension. And fourth, and perhaps more

1 importantly, would Mr. Fernandez have said the bag was his if
2 he knew there was drugs inside of it? Of course not. Why
3 would he have done that?

4 If the government's case is the way they make it sound,
5 there is no paperwork in the bag, all Mr. Fernandez would have
6 had to have done is say, "No, it's not my bag," and the bag
7 would have been deemed abandoned, and it would have been taken
8 off the bus by the agent. When Perry opened the black bag and
9 found the drugs inside, Mr. Fernandez quickly said that was not
10 his bag.

11 Mr. Hurtado pointed out something earlier. He argued
12 that Agent Perry placed the bag in front of Mr. Fernandez.
13 That might be true, but you know there is two seats, the aisle,
14 two seats. Those seats are not one, big seat. They are two,
15 separate seats with a gap. Agent Perry was searching the bag.
16 Agent Lemmon was in the front of the bus. Agent Perry wouldn't
17 have been watching what Mr. Fernandez was looking at. They
18 can't tell you today that Mr. Fernandez didn't see what was
19 going on during the search of the bag. He said, "It's not my
20 bag" when he's getting arrested. Clearly, he saw that there
21 was contraband inside.

22 Now, where is the evidence of possession? There is no
23 evidence of actual possession. I think the government will
24 concede that. So the government has to stretch. They have to
25 prove what's known as constructive possession. Keep in mind

1 the legal instruction you've been given on constructive
2 possession. "A person who although not in actual possession,
3 knowingly has the power and intent at a given time to exercise
4 dominion and control over an object either directly or through
5 another person or persons is then in constructive possession."
6 Power, intent. So the government must not only prove that
7 Mr. Fernandez had the power to exercise control the bag but the
8 intent to do so.

9 Where is the evidence? The bag was three to four rows
10 back. Mr. Fernandez is never seen with the bag. There is no
11 witness saying that they saw him touch it or carry it. There
12 is no fingerprint, no DNA. Who else had access to the bag?
13 Remember that short, little video clip of the individual
14 walking on the bus and off the bus? That's one thing we got
15 from the video. Who knows if there is other incidents where
16 other people had access to that bag before the passengers
17 reboard?

18 We live in an age of surveillance. There is no getting
19 around it. So you know it wouldn't have been that difficult
20 for the government to come up with its surveillance video, but
21 they didn't. We had no problem getting it. It suggests that
22 the government's lack of evidence here is telling. Speaks
23 volumes.

24 Now, another thing. Frank Dreke. Don't believe the
25 government's story. That's not a false name. I mean, it's not

1 lost on me, and it should not be lost on you, that
2 Mr. Fernandez Rodriguez as we know from the paperwork in this
3 case is being indicted and charged under Mr. Fernandez. Is
4 that a false name? Well, no. It's a name that he uses just as
5 in his family he uses Frank Dreke. He uses it since it's
6 shorter and it's easier to use than his given name, Fernandez
7 hyphen Rodriguez. Frank is short for Francisco, while Dreke,
8 as we know, is his father's mother's name, I believe.

9 Mr. Fernandez found it easier to use this name, less
10 spelling. He uses it publicly. Call for a pizza, "What's your
11 name?" He could say Fernandez Rodriguez, but Dreke is a lot
12 easier. Lidia Fernandez, his daughter, says he's always used
13 the name. She's heard him use it over the years. He has a
14 Facebook account in that name. He's never tried to hide
15 himself by using the name.

16 There is no law, by the way, also, that says when you
17 buy a bus ticket on Greyhound you have to use the name on your
18 birth certificate. Don't fall for that. He used it because
19 it's easier. Everyone knows him as Frank Dreke. The
20 government would have you turn this into something very
21 sinister, but it's not. So another example of the government
22 stretching and stretching to pin the blame on Mr. Fernandez.
23 Just as the photo of the paperwork coming from the bag is
24 manipulated evidence, so is the name Dreke as a way or a means
25 of hiding. That's manipulated.

1 Let me sum up. No touching of the bag, no DNA, no
2 fingerprints, no witnesses, no video that shows possession, no
3 papers in the bag, no name tag. There is no evidence of that
4 intent to possess the bag. A whole lot of nothing.

5 Certainly enough, though, to constitute reasonable
6 doubt. If there is anything here that makes you hesitate in
7 the most important affairs of life, you have reasonable doubt.

8 For government agents trained on the importance of
9 documenting, on the methods, on the process, of documenting a
10 search, and yet they come up with that photo of the paperwork,
11 don't accept that.

12 Now, this is my only opportunity to speak to you this
13 morning, and unlike the government, I don't get a second
14 chance, so first let me thank you very much, all of you very
15 much, for taking the time out of your busy days and schedules
16 these last three days. I know I appreciate it. I can speak
17 for Mr. Hurtado and, of course, my client, Mr. Fernandez,
18 appreciates it very much.

19 Now, the government has the burden, they get the last
20 word, and during Mr. Hurtado's final comments, I would ask you
21 to keep thinking and asking yourselves, does the government's
22 story add up. Where are the gaps in the evidence that I've
23 described? Does it all fit together? Can we really believe
24 the agents' testimony when they stretch evidence to make it fit
25 their case?

1 Mr. Hurtado will vehemently deny, I'm sure, that
2 federal law enforcement officers will break the rules, but if
3 you watch the news, you surely knows it happens, and it's
4 happened before, and it's going to happen again. But a badge
5 does not give you carte blanche to act above the law. Officers
6 must enforce the law but not bend it to their will. They don't
7 get to create dishonest stories to convict innocent people.

8 Demand justice here. The government must prove that
9 Mr. Fernandez possessed that bag. They must prove that he
10 possessed the drugs within the bag. Put the government to its
11 burden of having to prove beyond a reasonable doubt each and
12 every element of the crime. If you do this faithfully and
13 honestly, as I know you will, there is really only one verdict
14 here. There is too much here. Not guilty. Thank you.

15 THE COURT: Mr. Hurtado, you may present the
16 government's rebuttal argument.

17 MR. HURTADO: Yes, sir, thank you.

18 Ladies and gentlemen, this will be the final
19 opportunity I have to address you, and I wanted to take that
20 time to respond to many of the arguments that defense counsel
21 has made in its closing remarks.

22 Defense counsel relies heavily in his closing remarks
23 on the video that was obtained by defense counsel and
24 subsequently paired with the audio of the encounter between
25 Agent Perry and the defendant on the Greyhound Bus.

1 Mr. Robbenhaar suggests that the video that was made somehow
2 contradicts the testimony of Agent Perry and Agent Lemmon.

3 Mr. Robbenhaar, the defense attorney, goes so far as to
4 say that the government does not like that video, and he is
5 right. The United States prosecution does not like that video
6 because that video proves nothing. That video is bogus, it is
7 irresponsible, and it is irrelevant to the facts of this case.

8 The defense attorney had the opportunity to conduct a
9 cross examination of Agent Perry and Agent Lemmon, neither of
10 whom were able to definitively confirm the version of the facts
11 as set forth by defense counsel. That should bother you,
12 because there is no way to know whether that video in fact
13 accurately and fairly depicts the events as they actually
14 occurred on that Greyhound Bus. You have no evidence to show
15 what actually happened from the inside of that bus. And
16 Mr. Robbenhaar is right, I'm going to attack the quality of
17 that video. That video is poor quality. It is grainy. There
18 is no way to see what's going on inside.

19 The defense counsel also goes further in attacking the
20 quality of this investigation by submitting to you that there
21 is no DNA evidence, there is no fingerprint evidence. Ladies
22 and gentlemen, you knew that from the very beginning, because I
23 told you as far back as jury selection, that there would be no
24 such evidence, and every single one of you stated that would be
25 okay. Because this is not an episode of "CSI."

1 Now Mr. Robbenhaar is going so far as to accuse the
2 agents of planting evidence. Perhaps he's the one that's been
3 watching too many movies and television shows. The facts of
4 this case do not support that Agent Perry or Agent Lemmon
5 planted any evidence in this case. But with respect to
6 fingerprints and DNA and additional surveillance video, let's
7 take a look at what the jury instructions provide.

8 Just for the record, I'm publishing Jury Instruction
9 Number 1.

10 The judge has instructed you as follows: "It is also
11 your duty to base your verdict solely upon the evidence in the
12 case without prejudice or sympathy."

13 Ladies and gentlemen, you may not speculate about what
14 fingerprint evidence may have produced or DNA evidence may have
15 produced. There is no evidence of such items in this case.
16 Even if there were fingerprint evidence, you heard testimony
17 from Agent Perry who indicated that in his 20 years of
18 experience he has requested fingerprint analysis hundreds of
19 times, and only on one occasion has a fingerprint match ever
20 come back positive to the suspect he's arrested in connection
21 with one of his investigations.

22 I'm now publishing Defendant's Exhibit B18 on the
23 projector. It's a photograph of the paperwork that was seized
24 from the defendant's bag.

25 The defendant is trying to argue that this photograph

1 somehow contradicts or undercuts the testimony of the agents in
2 this case. That photograph does no such thing. As an initial
3 matter, that photograph is simply one snapshot in time, and
4 contrary to what Mr. Robbenhaar is trying to argue, we don't
5 necessarily know the time frame.

6 Agent Perry and Agent Lemmon have both stated in no
7 uncertain terms that those medical records came from the bag.
8 Now, it's true, we don't necessarily know from where inside the
9 bag. But I would like it noted that that bag actually does
10 have compartments on the side. There are compartments on
11 either side of the bag as well as in the front.

12 Yes, the medical paperwork was important, and that's
13 why there was a photograph of that medical record. But there
14 is also evidence in the bag that was important that was not
15 photographed. It doesn't mean that the agents were being lazy
16 or haphazard in the manner in which they were doing their
17 investigation. They focused on what was important.

18 For example, let's take a look at an important piece of
19 evidence that was not photographed. That's the Saran Wrap that
20 was found in the bag. There is no photograph of this Saran
21 Wrap, but it is just as important as the medical records
22 because it matches the wrapping that was used on the drugs that
23 were found in the defendant's bag.

24 The prosecution would also like to argue that nothing
25 in that video contradicts the evidence that's been presented

1 today. That video doesn't contradict the fact that the
2 defendant admitted ownership of the bag. It doesn't somehow
3 contradict the fact that the defendant had a surprised or
4 panicked look on his face when he saw Agent Lemmon and Agent
5 Perry on the bus. It doesn't contradict the fact that he was
6 using two different names.

7 Now, I understand that the defense put on a witness,
8 Lidia Fernandez, daughter of the defendant. I submit to you
9 that there are some problems with her testimony. Number one,
10 she's too closely related to this case. She's biased in favor
11 of the defendant. Now, even if you believe it's true that the
12 defendant also uses the name of Frank Dreke, I would submit to
13 you he's still using two different names, and in the experience
14 of Agent Perry, people who use different names, not necessarily
15 false names but different names, do so in order to try to
16 conceal their criminal activity.

17 Now, another thing that I would like to address with
18 respect to the video is Mr. Robbenhaar seems to be fixated on
19 the fact that he claims the video shows the defendant not
20 holding Government's Exhibit 2, which is the bus ticket to
21 board the bus, but rather Mr. Robbenhaar is suggesting that the
22 defendant had in his possession the medical records in his name
23 when he was boarding the bus. Ladies and gentlemen, a lot of
24 the government's case rests heavily on just common sense, which
25 I alluded to before. I would ask you, does it make sense for

1 the defendant to just haphazardly be walking around the
2 Greyhound Bus Station with his medical paperwork? Do you think
3 it makes sense for the defendant to have in his hand this
4 medical paperwork when he's about to board the bus, or do you
5 think it makes more sense that he would be holding the actual
6 bus ticket that he's going to use to travel to his intended
7 destination? I submit to you it makes more sense that he's
8 holding the bus ticket than it does that he's holding the
9 medical paperwork.

10 And ladies and gentlemen, please remember Agent Perry's
11 testimony. When he encounters the defendant, the defendant
12 presents his bus ticket to Agent Perry, not the medical
13 paperwork. That's not the testimony in this case. If the
14 defendant would have had his medical paperwork on his person at
15 the time that Agent Perry encountered him, the defendant would
16 have produced the medical paperwork as a source of
17 identification, and how do you know that? Because that's what
18 the defendant did a few days earlier at the Greyhound Bus
19 Station. When Agent Perry asked the defendant to produce
20 identification, he produced this, this paperwork, the medical
21 records in this case.

22 As I stated before, that video is grainy. It is hard
23 to see what he's holding when he tries to board the bus, but
24 again, it simply makes more sense that he's holding the bus
25 ticket than it is the paperwork on the medical records.

1 I have very limited time left, so I want to briefly
2 highlight some -- a few more points.

3 Mr. Robbenhaar brought up the issue of these passengers
4 Alexis Merritt and Christopher Merritt, attacking the quality
5 of Agent Perry's investigation that he should have followed up
6 on these two individuals, but those two individuals in this
7 case were not suspects in the case. They did not admit
8 ownership of the bag. That's why Agent Perry did not continue
9 to question them any further.

10 Now, the defendant is trying to argue that there is
11 nothing to show that the defendant possessed the bag in this
12 case, but the United States submits that there is an
13 instruction on actual versus constructive possession. I ask
14 you to read it. For example, right now, I'm in actual
15 possession of this wallet. If I leave it here, I am still in
16 constructive possession of this wallet. I do not have it
17 physically in my custody, but it is constructively in my
18 possession. It is still mine. So if Agent Perry takes that
19 wallet, I can say, "Hey, what are you doing? That's mine."
20 Because I'm able to exercise dominion and control over that
21 wallet. I do not relinquish custody just because it is not in
22 my physical custody.

23 Also, ladies and gentlemen, with respect to the
24 Merritts, please remember Jury Instruction Number 12: "Neither
25 are you called upon to return a verdict as to the guilt or

1 innocence of any other person or persons not on trial as a
2 defendant in this case." In other words, the fact that another
3 person may also be guilty, which the United States denies, is
4 no defense to the crime charged.

5 As I stated at the very beginning of this case, ladies
6 and gentlemen, all the evidence presented in this case points
7 squarely in the direction of that man there, the defendant, and
8 I ask that you please return a verdict of guilty not because I
9 said so, but because the facts say so.

10 I thank you for your time.

11 THE COURT: At this time, with my thanks, I'm going to
12 excuse Ms. Long and Mr. Cassin. You're the alternate jurors in
13 the case. It was very important that you be here in case one
14 of the regular jurors was unable to proceed. So I'm going to
15 ask everyone to stand while you leave the courtroom with our
16 thanks for your service.

17 (Alternate jurors excused.)

18 THE COURT: Please be seated.

19 Members of the jury, this is the point at which you
20 will go to the jury room to begin your discussions with each
21 other about the evidence in the case. This is the jury verdict
22 form and has the original verdict in it that you're to fill
23 out, or your foreperson is to fill out, when the jury has
24 reached a unanimous verdict.

25 I'm going to ask Ms. Carey to hand this to

1 Ms. Archuleta to take into the jury room.

2 It is a little before eleven o'clock. Do any of you
3 have any questions at this point before I ask you to go to the
4 jury room to begin your deliberations?

5 Take your notes with you.

6 Everyone please rise while the jury goes to the jury
7 room.

8 (Jury excused from the courtroom.)

9 THE COURT: Please be seated.

10 I don't require that the parties and counsel remain in
11 the courtroom throughout jury deliberation. If you will give
12 Ms. Carey a telephone number where you can be reached so that I
13 can ask you to return if we get a message from the jury, that
14 would be all right. You're welcome to leave the courtroom and
15 the courthouse.

16 Let me ask Mr. Hurtado, is there anything you want to
17 bring up before we recess?

18 MR. HURTADO: No, sir.

19 THE COURT: Mr. Robbenhaar?

20 MR. ROBBENHAAR: No, Your Honor.

21 THE COURT: Let me compliment both of you on your
22 closing arguments. I thought both were very well done. You're
23 going to make it difficult for the jury.

24 Anyway, court will be in recess.

25 (Court recessed at 10:55 a.m. to 2:02 p.m.)

1 (In open court, jury not present.)

2 THE COURT: Court's in session. Have a seat, please.

3 Let's take up first the question from the jury which is
4 "Agent Perry testimony copy of."

5 I think the response should be that "you must decide
6 the case on the basis of the evidence, testimony and exhibits
7 as presented in court."

8 Let me ask Mr. Hurtado your view.

9 MR. HURTADO: Yes, the United States would agree with
10 that.

11 MR. ROBBENHAAR: We would concur.

12 THE COURT: Okay. Let me write it out and make sure
13 there is no question.

14 Let me read it again to make sure you're agreement with
15 it. The response would be, "You must decide the case on the
16 basis of the evidence, the testimony and the exhibits as
17 presented in court."

18 MR. HURTADO: Yes, sir, the United States agrees.

19 MR. ROBBENHAAR: I think that's appropriate, Judge.
20 Sometimes I've had the responses include "you must rely on your
21 own memories of the testimony," but if we want to leave it as
22 is, that's fine, too.

23 THE COURT: Now, I understand you had something you
24 wanted to bring up. Is that correct?

25 MR. ROBBENHAAR: Yes, Your Honor.

1 Your Honor, this occurred at the close towards the end
2 of Mr. Hurtado's rebuttal closing argument. I didn't raise an
3 objection at the time, but I fear that Mr. Hurtado misstated
4 the law and made a misrepresentation of Jury Instruction Number
5 5. You will recall during that rebuttal argument he pulled his
6 wallet out of his pocket to demonstrate the idea of
7 constructive possession. And I think as I recall, and we
8 collectively recall, held his wallet and said, "Now I'm in
9 actual possession," basically, and then he placed the wallet on
10 the table, stepped back to the podium, and said, "I'm still in
11 possession, I still have control or dominion," I forget the
12 word. "If someone touches it, I can say, 'Hey, back off,'" or
13 something like that, "I'm still in control."

14 I don't think that's accurate, and maybe the court
15 reporter can clarify exactly what was stated, but during
16 Instruction Number 5, it's very clear when it talks about
17 constructive possession, it frames it the person must knowingly
18 have the power and intent at a given moment in time to exercise
19 dominion and control.

20 Intent was never mentioned, to my knowledge, by
21 Mr. Hurtado. I might be wrong. Clearly, the court reporter
22 can tell us otherwise, but I'm afraid that if intent wasn't
23 mentioned, and I don't think it was, that's a misstatement,
24 mischaracterization of the law, and I would fear that that
25 would place the jury in a bind because they heard him describe

1 what actual possession is, and constructive possession, they
2 saw him demonstrate this example which it turns out the way he
3 phrased it is incorrect under the law.

4 Under those circumstances, the case law is pretty clear
5 that if you mischaracterize or misstate jury instructions, that
6 in this circumstance could be prosecutorial misconduct.
7 Obviously, I don't think he has any intent to do that, I'm not
8 claiming that, but that's the legal analysis it would fall
9 under. So this is very concerning to the defense.

10 Under these circumstances, we would move for a mistrial
11 on those grounds, or in the alternative, a reinstruction to the
12 jury on Instruction Number 5 with the additional point made
13 that the government's argument regarding constructive
14 possession and the use of the wallet was incorrect, and so the
15 jury should disregard that aspect or that portion of the
16 government's argument.

17 THE COURT: Mr. Hurtado?

18 MR. HURTADO: Your Honor, the United States' position
19 is that the prosecution correctly made an analogy to
20 differentiate the distinction between actual versus
21 constructive possession. Also, what is stated in rebuttal is
22 just that. It's just argument. It's not evidence. And it is
23 further the position of the United States that it was accurate
24 with respect to the analogy that the United States used with
25 the wallet example that Mr. Robbenhaar made reference to.

1 With that said, however, because Mr. Robbenhaar has
2 made a motion for a mistrial, the United States would, of
3 course, oppose that motion, ask the court to deny that motion.
4 The United States would further request that the court deny
5 Mr. Robbenhaar's request to reinstruct the jury. And also the
6 United States, given the importance of the issue that
7 Mr. Robbenhaar raised, would respectfully ask that the court
8 make a finding with respect to the wallet argument, I'll call
9 it, that Mr. Robbenhaar has made. Thank you, sir.

10 THE COURT: Does either side have any cases close in
11 point?

12 MR. HURTADO: Your Honor, I do not at this time.

13 MR. ROBBENHAAR: The question was?

14 THE COURT: Any authority close in point?

15 MR. ROBBENHAAR: I don't in hand at the moment.

16 THE COURT: Well, I'm going to deny the motion for
17 mistrial based on the part of the closing argument to which the
18 defendant failed to object at the time it was made. The jury
19 has now been deliberating for over three hours. I think it
20 would cause confusion to single out parts of closing arguments
21 at this point.

22 I note that in Jury Instruction Number 1 the jury was
23 told to follow my instructions and to apply the law as I give
24 it to them regardless of the consequences.

25 In Instruction Number 5, it clearly sets forth the

1 definition of actual and constructive possession. The jury is
2 required to follow that instruction.

3 With respect to Instruction Number 6, the jury was told
4 that "remember that any statements, objections, or arguments
5 made by the lawyers are not evidence in the case. It is your
6 own recollection and interpretation of the evidence that
7 controls in the case. What the lawyers say is not binding upon
8 you." I think the instructions adequately protect the
9 defendant from concerns expressed about Mr. Hurtado's analogy
10 to the location of his wallet and whether that constituted
11 constructive possession, so I'm going to deny the motion for
12 mistrial based on that ground.

13 Now, again, I don't require you to remain in court for
14 the duration of the jury's deliberation, just provide us with
15 phone numbers where we can reach you to return if necessary.

16 Court's in recess.

17 (Court recessed at 2:12 p.m. to 2:36 p.m.)

18 (In open court, jury not present.)

19 THE COURT: Court's in session. Have a seat, please.

20 The jury foreman sent out another note that simply
21 added below the prior question, "Jury Instruction Number 6."
22 It's possible that the jury thinks that the term "sworn
23 testimony" means transcribed testimony. Instruction Number 6
24 says, "The term 'evidence' includes the sworn testimony of the
25 witnesses, the exhibits admitted in the record, and the

1 stipulations to which the parties agreed."

2 The earlier response was that "you must decide the case
3 on the basis of the evidence, the testimony and the exhibits as
4 presented in court." I don't know how otherwise to interpret
5 the reference to Jury Instruction Number 6 unless the jury
6 thinks it means that sworn testimony includes transcription of
7 the sworn testimony.

8 My suggestion would be to do somewhat like
9 Mr. Robbenhaar proposed previously and say, "You must rely on
10 your recollection of the sworn testimony that you heard and
11 observed when it was presented in court." Is that satisfactory
12 to the government?

13 MR. HURTADO: Yes, sir, and it appears also consistent
14 with Jury Instruction Number 6.

15 THE COURT: Mr. Robbenhaar?

16 MR. ROBBENHAAR: Yes, I think that's right, Judge. I
17 have no problem with telling them to rely on their -- probably
18 say "individual memories," something along that line. I don't
19 think the phrase "collective memories" is appropriate. I think
20 they have to reflect that each individual juror is going to
21 remember his or her own way. That's what they are going to
22 rely upon.

23 THE COURT: You like the word "individual" in front of
24 the word "recollection"? The way I have proposed it is, "You
25 must rely on your recollection of the sworn testimony that you

1 heard and observed when it was presented in court."

2 MR. ROBBENHAAR: Perhaps each of your individual
3 recollections or -- what do you think?

4 MR. HURTADO: I prefer the word "recollection." The
5 reason for that is I just wanted to mirror what is stated in
6 Jury Instruction Number 6.

7 THE COURT: Why don't we put the words "each of you" in
8 front of this.

9 MR. ROBBENHAAR: Okay. I think that's fair.

10 MR. HURTADO: Sure.

11 THE COURT: Okay. We'll do it and read, "Each of you
12 must rely on your own recollection of the sworn testimony that
13 you heard and observed when it was presented in court." Is
14 that satisfactory?

15 MR. HURTADO: Yes, sir.

16 MR. ROBBENHAAR: Yes. Thank you, Judge.

17 Jury Instruction Number 6 does actually reference,
18 final sentence, "It is your own recollection and
19 interpretation," so I think what the court is proposing I think
20 is consistent with Jury Instruction Number 6.

21 MR. HURTADO: Your Honor, may I throw something out
22 there?

23 THE COURT: Sure.

24 MR. HURTADO: I'm wondering if it wouldn't be
25 worthwhile to just state that they are not entitled to a copy

1 of the transcript, that seems to be where their attention is
2 focused, in addition to what the court is writing. Maybe just
3 include something along the lines of "you are not entitled to
4 the transcript." It's just an idea.

5 THE COURT: Well, if both sides agree to it, I can
6 include that, sure.

7 MR. ROBBENHAAR: I think our position would be to
8 answer as the court proposed and just let the jury rely upon
9 the instructions.

10 THE COURT: Yes, I think I'll just first start with
11 this. Listen carefully. "Each of you must rely on your own
12 recollection of the sworn testimony that you heard and observed
13 when it was presented in court."

14 MR. HURTADO: That's fine with the government.

15 MR. ROBBENHAAR: Agreed.

16 THE COURT: All right. That's the response I'll send.
17 Court's in recess.

18 (Court recessed at 2:43 p.m. to 3:01 p.m.)

19 (In open court, jury not present.)

20 THE COURT: Court's in session. Have a seat, please.

21 The last message from the jury was, "We are at a
22 deadlock, cannot come to an unanimous decision."

23 Let me ask first Mr. Hurtado how you would like to
24 respond to this.

25 MR. HURTADO: Your Honor, the prosecution suggests that

1 the court proceed with an Allen charge at this time. I think
2 it's appropriate. That's the government's suggestion.

3 THE COURT: And Mr. Robbenhaar?

4 MR. ROBBENHAAR: Your Honor, we would move for a
5 mistrial at this time.

6 THE COURT: You would object to an Allen charge?

7 MR. ROBBENHAAR: Yes, sir.

8 THE COURT: Okay. Let me ask Mr. Hurtado why you think
9 an Allen charge is appropriate in this circumstance.

10 MR. HURTADO: Your Honor, the reason the United States
11 feels an Allen charge is appropriate is that the Allen charge
12 is specifically designed to address this kind of situation. As
13 the court is no doubt aware, the Allen charge indicates that it
14 is not uncommon for a jury to find themselves in this position,
15 but with a little bit more deliberation perhaps they can reach
16 a unanimous decision.

17 Also, Your Honor, as the court is no doubt aware, this
18 is going to require another trial and a significant investment
19 of the court's resources, time and staff. As such, I think it
20 would benefit actually both parties to have this case resolved,
21 and I think one way to go about potentially resolving this is
22 through an Allen charge.

23 I actually don't see a reason why not to do it.

24 THE COURT: Do you have a draft of a proposed Allen
25 charge?

1 MR. HURTADO: No, sir, I do not.

2 THE COURT: Mr. Robbenhaar?

3 MR. ROBBENHAAR: Your Honor, this is the third
4 essentially -- it's not really a question, but the third note
5 from the jury in very short sequence. They have been out for
6 four hours or so, roughly. Obviously, there is a lunch in the
7 middle. But at this point, we would move for a mistrial. I
8 would draw back on my earlier concern with the first -- for the
9 part that I raised earlier regarding the rebuttal argument by
10 counsel during closing and the constructive possession issue.
11 I think all of that combined, I am suggesting that a mistrial
12 at this time is appropriate.

13 THE COURT: Okay. Let me take a recess, and I'll get
14 back to you.

15 (Court recessed at 3:04 p.m. to 3:23 p.m.)

16 (In open court, jury not present.)

17 THE COURT: Court's in session. Have a seat, please.

18 I've provided for your consideration the Tenth
19 Circuit's Modified Allen Instruction. Let me ask counsel if
20 you have comments on this. Mr. Hurtado?

21 MR. HURTADO: Your Honor, United States finds it
22 acceptable and would propose to use this Allen instruction to
23 the jury.

24 THE COURT: Mr. Robbenhaar?

25 MR. ROBBENHAAR: Your Honor, we have some concerns with

1 the Modified Allen Instruction as written. We think of this in
2 terms of the sixth paragraph would be on page 2 of the handout.
3 The first paragraph, I really don't have a problem with.

4 First of all, I oppose the giving of the instruction.
5 Okay? But that said, paragraph number one, we don't have an
6 objection to. Paragraph number two, that's concerning to the
7 defense for a number of reasons. The jury has been instructed
8 throughout this case, at least initially, and then I think at
9 the final instruction, that it should give no concern to its
10 verdict, the consequences of its verdict to play no role in
11 this particular case.

12 Paragraph number two basically says, "Oh, boy, if we
13 don't get a verdict, we may to come back and have another
14 trial" and to "make another large investment of time and
15 effort." I think that's kind of placing a little bit of guilt
16 upon the jury, responsibility for its failure to reach a
17 decision. So I would oppose on those grounds regarding
18 paragraph number two.

19 THE COURT: What exact language are you concerned about
20 in two?

21 MR. ROBBENHAAR: It says in paragraph number two, "If
22 you should fail to agree upon a verdict, the case is left open
23 and must be tried again. Obviously, another trial would
24 require the parties to make another large investment of time
25 and effort, and there is no reason to believe that the case can

1 be tried again by either side better or more exhaustively than
2 it has been tried before you." That language is concerning
3 because it's having the jury then consider the consequences of
4 its inability to reach a verdict, and it's basically making the
5 jury potentially feel guilty or bad because it can't reach a
6 verdict. So that's injecting into jury deliberations a whole
7 element, an emotional element, feeling responsibility for its
8 inability to reach a verdict which I think is entirely improper
9 in this.

10 Moving on to paragraph number three, the first sentence
11 is fine: "You are reminded that the defendant is presumed
12 innocent, and that the government, not the defendant, has the
13 burden of proof and it must prove the defendant guilty beyond a
14 reasonable doubt." However, the balance of paragraph three, I
15 feel, is inherently coercive. It is not needed, especially
16 what's stated in paragraph four; but before I get to paragraph
17 four, if you look at the application note or the use note
18 that's attached, the citation at the end of that use note is
19 United States versus McElhiney, 275 F.3d 928, Tenth Circuit
20 opinion from 2001, in which the Tenth Circuit strongly urged
21 that to avoid impermissible coercion certain language should be
22 included, and there is a quotation. That language is not in
23 this proposed instruction.

24 Getting back to paragraph three, the language that
25 starts the second sentence, "Those of you who believe that the

1 government has proved the defendant guilty beyond a reasonable
2 doubt should stop and ask themselves if the evidence is really
3 convincing enough," and then it continues, "And those of you
4 who believe the government has not proved the defendant guilty
5 should stop and ask yourselves if the doubt you have is a
6 reasonable one." I just feel that that is coercive to each
7 individual juror and is potentially causing that juror to
8 relinquish his or her own conscientiously held conviction.

9 Paragraph four, starting with "It is your duty as
10 jurors," that first sentence is fine. Really, I think the
11 fourth paragraph is fine in my mind.

12 THE COURT: Well, it is essentially the same as the
13 instruction --

14 MR. ROBBENHAAR: Excuse me --

15 THE COURT: -- already given.

16 MR. ROBBENHAAR: Right. I think it is also duplicative
17 and redundant to what's trying to be stated in number three.
18 So four is still, I think, coercive, but it is better than
19 paragraph three. So we would prefer four in lieu of three.
20 Excluding the first sentence of paragraph three is fine.

21 Moving down to five, the little, tiny paragraph at the
22 bottom, is fine.

23 And paragraph six which starts on the second page is
24 fine.

25 So those are my concerns with this Modified Allen

1 Instruction, Your Honor.

2 THE COURT: Let me state that paragraph four is
3 virtually identical to the instruction given to the jury as
4 Instruction Number 13. I'm not sure that it is necessary to
5 repeat it in an Allen instruction.

6 Let me ask you to do this. Let me ask counsel to meet
7 to see if you can come to an agreement on a modified Allen
8 instruction by focusing on the first three paragraphs of the
9 Modified Allen Instruction from the Tenth Circuit that I've
10 given you, see if you can maybe revise the language to the
11 point that it would be acceptable to both sides. I'll be in
12 recess while you work on that. And I would leave out of the
13 charge paragraph four because it's included as Instruction 13
14 in the court's instructions.

15 Court's in recess.

16 (Court are you received at 3:31 p.m. to 3:44 p.m.)

17 (In open court, jury not present.)

18 THE COURT: Court's in session. Have a seat, please.

19 What I intend to do is to give a somewhat shortened
20 Modified Allen Instruction. Do each of you have the Tenth
21 Circuit --

22 MR. HURTADO: Yes, sir.

23 MR. ROBBENHAAR: Yes, Your Honor.

24 THE COURT: This is what I would propose: Leave the
25 first paragraph as is.

1 In the second paragraph in the second sentence, revise
2 it to say that "if you fail to agree upon a verdict, the case
3 is left open and may be tried again" instead of "must be tried
4 again." Then in the next sentence, I would edit to read,
5 "Obviously, another trial would require the parties to spend
6 more time and effort." And the last sentence would be, "There
7 is no reason to believe the case can be tried again by either
8 side better or more exhaustively than it has been tried before
9 you."

10 Leave the third paragraph intact, eliminate the fourth
11 paragraph, leave the fifth paragraph as is, and then make a
12 minor change in the wording in the sixth paragraph so that it
13 would read, "I will ask now that you return to the jury room
14 and continue your deliberations," et cetera.

15 Let me ask for your comments on those edits.

16 MR. HURTADO: Yes, Your Honor, that is acceptable for
17 the United States.

18 THE COURT: Mr. Robbenhaar?

19 MR. ROBBENHAAR: I'm sorry, Judge, would you repeat the
20 modified language or the modification to paragraph 2?

21 THE COURT: Sure. The first sentence remains the same.

22 MR. ROBBENHAAR: Yes.

23 THE COURT: The next sentence reads the same except the
24 word "must" is changed to "may." Then the third sentence would
25 read, "Obviously, another trial would require the parties to

1 spend more time and effort," delete the "and," and then begin
2 the fourth sentence with "there is no reason."

3 MR. ROBBENHAAR: Thank you. I would reiterate my
4 earlier objection to paragraph 2 in its entirety. I feel that
5 it just places a weight upon the jury to try to reach a verdict
6 for the sake of the court and for the sake of the parties. It
7 feels -- it seems to me that this places a burden on the jury
8 and can make them feel responsible if they don't reach a
9 verdict.

10 Regarding the third paragraph, I would simply restate
11 my earlier argument. I would say the first sentence which
12 reminds the jury of its burden, ending upon the language
13 "beyond a reasonable doubt," I think that's fine. If the court
14 were to -- the rest of the paragraph, I would move to have it
15 struck and omitted. If the court required or felt the need to
16 have some sort of language, I would refer the court to the
17 McElhiney language on the use note which is a quotation
18 inserted at the end of the use note.

19 I agree with the court regarding paragraph four.

20 I have no problem with paragraph five, and I have no
21 problem with paragraph six. So that would be the defense
22 position.

23 I guess the default would be, Your Honor, paragraphs
24 one, five and six, but if the court is going to impose -- put
25 in language from paragraph two, three or even four, then I just

1 stated how I would have that read.

2 THE COURT: Let me ask Mr. Hurtado, what about instead
3 of paragraph three in its entirety using the first sentence and
4 then the language from the McElhiney case?

5 MR. HURTADO: Your Honor, here is the issue the United
6 States has. First of all, the United States would accept the
7 Modified Allen Instruction as initially proposed by this court.
8 The United States would have no problem with that.

9 The problem with paragraph number three is that the
10 language is neutral in the sense that it addresses matters that
11 are favorable to the defense and the United States. The United
12 States believes that the language in McElhiney is not
13 necessary. This is a stock instruction that has already passed
14 muster with the Tenth Circuit. There is no reason to modify
15 the language in paragraph three. The United States agrees with
16 the court's initial assessment that that paragraph in its
17 entirety should be included for purposes of this Allen
18 instruction.

19 If the court wishes to incorporate McElhiney in
20 addition to what it has already provided in paragraph three,
21 the United States would have no objection. Other than that,
22 Your Honor, the United States would be in agreement with, as I
23 stated, the court's initial modified Allen instruction as
24 proposed.

25 THE COURT: What I propose doing now is to some extent

1 incorporating language from McElhiney into the third paragraph
2 so that it would read as follows. The third paragraph would be
3 attached down to the last sentence which would be deleted, and
4 in place of the last sentence, there would be a sentence
5 stating, "Although no juror should relinquish either his or her
6 conscientiously held convictions simply to secure a verdict,
7 every individual juror should reconsider his or her views
8 whether in the majority or the in the minority."

9 MR. HURTADO: Yes, sir, that would be acceptable to the
10 United States.

11 THE COURT: Let me ask Mr. Robbenhaar, do you have
12 comments on that?

13 MR. ROBBENHAAR: My only comment is that it appears to
14 be the intent of the McElhiney language essentially what's
15 already stated in paragraph three. That seems duplicative to
16 me to have both in there. I think the quoted language that the
17 court just used from the McElhiney opinion is more appropriate
18 than what's previously or what's presently in paragraph three.
19 So I just don't think we need both.

20 Again, so the record is perfectly clear, I think it is,
21 but I wanted the record to be clear that we don't believe a
22 modified Allen instruction at all should be given by this
23 court.

24 THE COURT: Let me ask Mr. Hurtado, what is your view
25 as suggested by Mr. Robbenhaar?

1 MR. HURTADO: The United States would oppose, Your
2 Honor. Once again, the United States is in agreement with the
3 proposed modified Allen instruction as set forth by the court.

4 The United States agrees specifically that paragraph
5 three should be incorporated into the Modified Allen
6 Instruction to include the McElhiney language that the court
7 recited earlier on the record. The United States believes that
8 paragraph three and the language incorporated in McElhiney
9 fully addresses the situation that we have here with respect to
10 the deadlocked jury. The United States does not believe it's
11 duplicative. There is a reason that the Tenth Circuit held
12 that the language in McElhiney should be used as well as the
13 language set forth in paragraph three of the Modified Allen
14 Instruction.

15 I believe that the court's suggestion is a reasonable
16 compromise, and the United States would not oppose the Modified
17 Allen Instruction as provided by the court.

18 THE COURT: I tend to agree that Mr. Robbenhaar's
19 correct when he says that incorporating the language from
20 McElhiney that I had proposed into paragraph three creates a
21 redundancy, so what I intend to do now is have paragraph three
22 as follows: "You are reminded that the defendant is presumed
23 innocent and that the government, not the defendant, has the
24 burden of proof, and it must prove the defendant's guilt beyond
25 a reasonable doubt. Although no juror should relinquish his or

1 her conscientiously held convictions simply to secure a
2 verdict, every juror, every individual juror, should reconsider
3 his or her views whether in the majority or in the minority."
4 That's what I propose as paragraph three.

5 Any further comment on that?

6 MR. HURTADO: No, sir, not from the government.

7 MR. ROBBENHAAR: No, Your Honor.

8 THE COURT: All right. Let's rise while the jury
9 enters, please.

10 (Jury returned to the courtroom.)

11 THE COURT: Please be seated.

12 Mr. Ocana, you're the foreperson of the jury. Is that
13 correct?

14 MR. OCANA: Yes, sir.

15 THE COURT: At this point, the jury is unable to reach
16 a unanimous verdict?

17 MR. OCANA: Yes, sir.

18 THE COURT: I'm going to give you a further instruction
19 and ask that you listen carefully as I read this to you.

20 Members of the jury, I'm going to ask that you return
21 to the jury room and deliberate further. I realize that you
22 are having some difficulty reaching a unanimous agreement, but
23 that is not unusual. Sometimes, after further discussion,
24 jurors are able to work out their differences and agree.

25 This is an important case. If you should fail to agree

1 upon a verdict, the case is left open and may be tried again.
2 Obviously, another trial would require the parties to spend
3 more time and effort. There is no reason to believe that the
4 case can be tried again by either side better or more
5 exhaustively than it has been tried before you.

6 You are reminded that the defendant is presumed
7 innocent and that the government, not the defendant, has the
8 burden of proof and it must prove the defendant guilty beyond a
9 reasonable doubt. Although no juror should relinquish his or
10 her conscientiously held convictions simply to secure a
11 verdict, every individual juror should reconsider his or her
12 views whether or not in the majority or in the minority.

13 What I have just said is not meant to rush or pressure
14 you into agreeing on a verdict. Take as much time as you need
15 to discuss things. There is no hurry.

16 I will ask now that you return to the jury room and
17 continue your deliberations with these additional comments in
18 mind. Of course, in conjunction with all of the instructions I
19 have previously given to you.

20 Everyone please rise while the jury goes back to the
21 jury room.

22 (Jury excused from the courtroom.)

23 THE COURT: Okay. We'll be in recess, but at this
24 point, I would ask that you remain in the courtroom if you
25 don't mind.

1 MR. HURTADO: Yes, sir.

2 THE COURT: Court's in recess.

3 (Court recessed at 4:00 p.m. to 5:10 p.m.)

4 (In open court, jury not present.)

5 THE COURT: Court's in session, have a seat, please.

6 We have received another note from the jury that states "once
7 again still on a deadlock, still not unanimous, no change."

8 Let me ask counsel for your comments on this note.

9 Mr. Hurtado?

10 MR. HURTADO: Looks like the jury is on a definite
11 impasse at this time. The United States would ask the court to
12 find manifest necessity in light of the fact that the jury was
13 unable to reach a verdict in this case.

14 THE COURT: Mr. Robbenhaar?

15 MR. ROBBENHAAR: I tend to agree. I think it appears
16 to us that the jury is unable to reach a verdict. I think
17 under the circumstances a mistrial should be granted.

18 THE COURT: Okay. They have been deliberating since
19 about 11:00 this morning, so that's now roughly six hours, a
20 little more. It's about 5:15. When we selected the jury, I
21 had told them that the trial might extend into Thursday and
22 asked them to be available until then. I could, if there is no
23 objection, suggest that they go home and relax and return
24 tomorrow to see if they could reach a verdict tomorrow morning.

25 MR. HURTADO: Actually, Your Honor, that sounds like a

1 good idea. I think maybe a fresh set of eyes and a fresh mind
2 might serve them well to come back and reconsider the evidence.
3 The United States would agree with that proposal.

4 THE COURT: Mr. Robbenhaar?

5 MR. ROBBENHAAR: I don't have a strong objection to
6 that. It seems to me that we're deadlocked, and I would move
7 for a mistrial, but if the court --

8 THE COURT: Well, one of my concerns is the length of
9 time the defendant's been in custody. How long is that now?

10 MR. ROBBENHAAR: Since October 25, 2017. So about a
11 year and five months, I think.

12 THE COURT: You, of course, have no idea of what the
13 result might be if the jury deliberated further, but if it were
14 a verdict of acquittal, I hate to see the defendant remaining
15 in custody until we can try the case again.

16 MR. HURTADO: That sounds like a totally reasonable
17 concern that the court has expressed. In light of that
18 concern, the United States is not opposed to resuming the jury
19 and have them deliberate starting fresh tomorrow morning.

20 THE COURT: Mr. Robbenhaar?

21 MR. ROBBENHAAR: I share your concern, Your Honor.
22 Obviously, my client's pretrial detention has been very
23 lengthy. There has been a lot of litigation in the case, but
24 nonetheless, I would hate to have it drag out for however long
25 it takes to retry the case. I have no strong objection to

1 holding the jury over to tomorrow, but...

2 THE COURT: Let's do this. Let's invite the jury in.
3 I'll ask if -- well, I could ask the foreman if he thinks there
4 is a possibility that that would work, or any of the other
5 jurors if they think it might work. I guess if they are
6 adamant, I probably don't have an option to make them come back
7 tomorrow.

8 MR. ROBBENHAAR: I would only state on that issue if we
9 were to poll the jury I would be cautious about doing so. I
10 think it would be appropriate perhaps to ask the jury foreman a
11 simple question along the lines, "Do you feel there is any
12 chance that further deliberations might result in a verdict,"
13 but I wouldn't want to get into having individual jurors --

14 THE COURT: No, I wouldn't intend to poll them.

15 MR. ROBBENHAAR: Okay.

16 THE COURT: Well, everyone rise while the jury enters.

17 (Jury returned to the courtroom.)

18 THE COURT: Please be seated. Let me say this. I sent
19 you out to start your deliberations about 11:00 this morning,
20 so you have now been working hard for more than six hours. I,
21 in particular, and the parties appreciate your hard work in the
22 case. And there are times when, as happens here, a jury simply
23 cannot reach a unanimous verdict.

24 When I selected the jury on Monday afternoon, one of
25 the questions I asked you is if you could be available through

1 Thursday, tomorrow, and the question we have for Mr. Ocana, the
2 foreperson of the jury, is whether you think by going home and
3 getting a rest finally, there might be a possibility with a
4 fresh start tomorrow morning that the jury would be able to
5 reach a unanimous verdict.

6 MR. OCANA: At this time, sir, I don't think so.

7 THE COURT: All right. Under the circumstances, then,
8 I'm going to declare a mistrial, which means that there is no
9 result in this case, and the case may have to be tried before a
10 different jury in the future.

11 What I'm going to ask you to do is to go back to the
12 jury room, wait a few minutes. The court has a gift for you
13 for your service. I want to bring that to you, and then we'll
14 let you go home.

15 Everyone please rise while the jury goes to the jury
16 room.

17 (Jury excused from the courtroom.)

18 THE COURT: Have a seat, please. I'm going to visit
19 with the jury briefly and give them coffee cups that we now do
20 for their service, and I will tell them while visiting with
21 them that the lawyers may be interested in talking to them
22 about their performances in the case, but I'll also tell them
23 they are not required to talk to you, and that if they prefer
24 not to that they tell you that, and that you are not to bother
25 them any further.

1 Why don't you wait here for just a little bit. I'll go
2 back and visit with them and come back to tell you if any of
3 them want to stick around and talk.

4 (Court recessed at 5:21 p.m. to 5:27 p.m.)

5 THE COURT: Let me say that there are several jurors
6 that are perfectly happy to talk to the lawyers about the case,
7 and they will be out in the hallway, so you can visit with them
8 out there.

9 All right. Let me ask you one other thing. Could you
10 retry this case beginning two weeks from Monday which would be
11 the 18th, 19th and 20th? I'm not sure I can do it then because
12 I may not have a court reporter available.

13 MR. HURTADO: The 18th would work for the United
14 States, Your Honor. How about next week on Monday?

15 THE COURT: I cannot do it next week.

16 Well, let me get back to you about it. Why don't you
17 go on and visit with the jurors at this time.

18 (Court recessed at 5:29 p.m.)

19

20

21

22

23

24

25

	I N D E X	P A G E
1		
2		
3	JURY CHARGE	4
4	CLOSING ARGUMENT BY MR. HURTADO	14
5	CLOSING ARGUMENT BY MR. ROBBENHAAR	24
6	REBUTTAL ARGUMENT BY MR. HURTADO	39
7	ALTERNATES EXCUSED	46
8	JURY NOTE 1	48
9	DEFENDANT'S MOTION FOR MISTRIAL	50
10	JURY NOTE 2	52
11	JURY NOTE 3	55
12	DEFENDANT'S MOTION FOR MISTRIAL	56
13	ALLEN CHARGE DISCUSSION	56
14	ALLEN CHARGE BY THE COURT	67
15	JURY NOTE 4	69
16	DEFENDANT'S MOTION FOR MISTRIAL	69
17	MISTRIAL DECLARED	72
18	REPORTER'S CERTIFICATE	
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA
DISTRICT OF NEW MEXICO

I, John De La Rosa, RPR, CCR, Official Court Reporter for
the State of New Mexico, do hereby certify that the foregoing
pages constitute a true transcript of proceedings had before
the said Court held in the City of Albuquerque, New Mexico, in
the matter therein stated.

In testimony whereof, I have hereunto set my hand on this
11th day of April, 2019.

JOHN DE LA ROSA, CCR
United States Official Court Reporter
421 Gold Avenue, Southwest
Albuquerque, New Mexico 87102
Phone: 505.348.2249